SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1502

AVNET, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG
Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006
(202) 872-6000

September 30, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITIONER'S REPLY MEMORANDUM

I.

Avnet demonstrated in its Petition that this case represents a clear example of a recurring procedural problem in administrative practice—the failure of agencies to give clear notice to respondents when they depart from the allegations of a complaint. In this case, the Court of Appeals specifically found that "Avnet's reading of the complaint was . . . reasonable" and that the case was decided on an entirely different basis from that originally alleged. 511 F.2d at 76. Because of lack of

notice, Avnet was forced to try the case without any clear indication of the factual and legal theories it was required to meet. The Petition suggests a simple remedy: whenever an agency departs from the allegations of a complaint, it should explicitly acknowledge this fact on the record.

The Government's response to this argument in fact provides the most cogent reason why certiorari should be granted and the proposed remedy adopted. Now we are told that Commission counsel never changed theories. Instead, they are supposed to have known all along that the market which the Complaint alleged to include all "rebuilders" was to be restricted so that it included only production-line rebuilders. A simple question immediately arises: if Commission Counsel knew all along that they were pursuing a theory which departed from what the Court of Appeals found to be the "reasonable" reading of the Complaint, did they not have an affirmative obligation to inform the Respondent of the change? The Government's answer is that no such obligation exists—ambiguous complaints, which mean different things to the different parties, are an acceptable part of administrative practice. We submit that this Court should not permit such an approach to fair administrative procedure to continue unchecked. Agencies should not be permitted knowingly to mislead parties about the issues which they are being required to meet.

The facts of this case provide a perfect example of the dangers inherent in the Government's approach. During the Commission's presentation of its own case, it elicited testimony from rebuilder suppliers concerning their sales in the relevant market by asking generally worded questions concerning their sales to "rebuilders."[1] We are now told that when Commission counsel asked

[1] App. 594, 601, 616-17, 627-29, 664, 685; CX 26, 271, 272, 273, 274, 278.

these questions it was seeking evidence only about sales to "production-line rebuilders." But the witnesses clearly gave answers consistent with a broader reading of the questions (and of the similar language in the Complaint),[2] and Avnet on cross examination did not attack these answers because it too "misread" the "ambiguity" which the Government now says it knowingly allowed to be inserted in the case. Cross-examination would have shown that the Government's alleged market share data did not correspond with its own definition of the market.

If Commission counsel knew that Avnet was proceeding on an understanding which was reasonably based upon language in the Complaint, but which differed from the approach they were following, they had an obligation to so state. Instead, it is now clear—at least if we accept the Government's current arguments—that Commission counsel were content to engage in gamesmanship and to take advantage of an "ambiguity" which allowed them a tactical advantage. As we argued in the Petition, this Court should grant certiorari to consider whether such practices can be allowed to continue.

II.

We also demonstrated in the Petition that the decision of the Court below was in direct conflict on the market definition issues with the decision of the Ninth Circuit in *International Tel. & Tel. Co.* v. *General Tel. and Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975). The

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[2] *See, e.g.*, App. 460 (Precision Field Coil offered coils packaged separately and thus not sold to "rebuilders" by the Commission's definition); App. 592 (Butts Electric sold to a few repair shops such as garages); App. 743, 933-34 (Ennis' customers included repair shops and small rebuilders); App. 760-61 (IPM sold to various kinds of companies termed "repair shops" by the Commission); App. 1007 (Valley Forge packaged some products individually and sold to custom rebuilders); CX 273 c-i (Preferred Electric offered parts sold and packaged individually and, thus, not sold to the Commission's "rebuilders" which allegedly buy in bulk).

Seventh Circuit held that "the clear functional difference between the two groups of rebuilders [custom and production-line] provides an adequate prima facie basis for placing them in different submarkets," 511 F.2d at 78, even though both groups purchased identical products and used them for identical purposes. The Ninth Circuit, in contrast, held that a "functional difference" could not justify an exclusion of a group of purchasers from a market; it refused to exclude from the relevant market sales of identical items of telephone equipment to customers other than telephone operating companies since sales to the operating companies were included in the market. The Government's brief argues that there is no conflict because the group of purchasers included in the market by the Seventh Circuit were peculiarly "dependent" on a particular group of rebuilder suppliers.

The Government's purported distinction does not, however, eliminate the conflict. The Commission argued the "dependence" theory to the Court of Appeals, but the Court did not adopt it. Instead, it rested its decision on the supposed "functional difference" among rebuilders, and this rationale is directly in conflict with the decision of the Ninth Circuit.

Moreover, even if the Government's "dependence" rationale had been adopted by the Seventh Circuit, there would still be a conflict, because another portion of the Ninth Circuit's *ITT* decision rejected that rationale as well. The Ninth Circuit—in addition to rejecting "functional differences" among equipment purchasers as a ground for distinguishing submarkets—was also faced with an argument that a certain segment of the purchasers' market (the Bell operating companies) was heavily dependent—indeed legally dependent under the terms of a consent decree—upon a particular supplier of telephone equipment (Western Electric). The district court had accepted that finding and excluded the Bell

operating companies from the relevant customer market. The Court of Appeals reversed, concluding that even "vertical foreclosure in itself does not justify defining a customer market to exclude 'captive sales'" and that there was "no basis for concluding that Bell's purported foreclosure of a large fraction of the telephone equipment market is an immutable fact of market life." 518 F.2d at 931. Thus the Ninth Circuit has held that dependence, even to the point of "captive sales," is insufficient, by itself, to distinguish one group of customers buying an identical product from another group, and to exclude one group from a relevant market. Yet that discredited theory—which was put forth by the FTC in this proceeding but implicitly rejected by the Seventh Circuit—is advanced at this stage as the ground upon which the conflict can be avoided.[3]

Thus, whether the Court below excluded sales to custom rebuilders from the product market because of the purported peculiar dependence of other rebuilders on particular suppliers, or whether it acted (as its opinion specifically states) on the basis of alleged functional differences among rebuilders, the decision below squarely conflicts with the holdings in the Ninth Circuit in *ITT*, and resolution of the conflict by this Court is required.

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[3] In fact, Avnet argued in its brief to the Court of Appeals that the record would not support a finding of "dependency." Reply Brief at 11-17.

CONCLUSION

For the reasons stated above and in our Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

ARNOLD M. LERMAN
RONALD J. GREENE
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Attorneys for Petitioner, Avnet, Inc.

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